IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-292

JAMES H. ASHLEY AND PAT MALONEY,
Petitioners,

VERSUS

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONER

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MISCELLANEOUS STATUTES AND CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES
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VERSUS

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

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Jack Pasqual
2001 Frost Bank Tower
San Antonio, Texas 78205

Attorneys for Petitioners

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, JAMES H. ASHLEY and PAT MALONEY, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, which final judgment was rendered, on Petition for Rehearing, on the 8th day of June, 1976 by the Honorable Justices Tuttle, Thornberry and Tjoflat, Circuit Judges. The Order of June 8, 1976 is a final judgment of the United States Court of Appeals and said Order refused to review the judgment of that Court affirming the judgment of the United States District Court for the Western District of Texas, San Antonio Division.

OPINIONS BELOW

(1) The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in 529 F. 2d 694.

(2) There is appended to this Petition a copy of the aforesaid opinions delivered upon the rendering of the Judgment or Decree sought to be reviewed in this case, as provided by Supreme Court Rule 23 (i).

GROUNDS OF JURISDICTION

(i) The date of the Judgment or Decree sought to be reviewed and the time of its entry is April 2, 1976.

(ii) The date of Order respecting Rehearing is June 8, 1976.

(iii) The statutory provision believed to confer upon this

Supreme Court jurisdiction to review the Judgment or Decree in question by writ of certiorari is Title 28 U.S.C. Sec. 254(1).

QUESTIONS PRESENTED

The Order sought to be reviewed is an appeal by a non-party witness and his attorney from an order of the District Court holding each of them in contempt of Court, fining them Five Hundred ($500.00) Dollars per day for contempt, and imposing sanctions in the sum of Two Thousand ($2,000.00) Dollars. The Order is based upon the allegedly contemptuous acts of the Petitioners in declining to testify at an oral deposition. The Petitioners did appear at the deposition pursuant to subpoena, but abstained from testifying, because the Trial Court's order refusing Ashley a stay pending appeal was being presented to the Appellate Court, pursuant to the Federal Rules of Appellate Procedure. Notwithstanding the appeal by Petitioners, they were cited for contempt and both were adjudged guilty of contumacious and contemptuous conduct, fined and subjected to sanctions. An appeal resulted. Should the Trial Court's Order be permitted to stand, it sets a precedent for the tenet ~~tenant~~ that if one resorts to his right of appeal he stands in jeopardy of contempt for resorting to such constitutional right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States of America proscribes the action taken by the District Court in this case, which deprives Petitioners of life, liberty or property without due process of law.

Further, Rule 26(c), Federal Rules of Civil Procedure, provides that a person from whom discovery is sought may for

good cause shown secure an order which justice requires to protect the person from annoyance, embarrassment, oppression or undue burden. Said Rule is involved in this case.

Rule 37(d), Federal Rules of Civil Procedure, provides that a Court may impose sanctions and make such Orders as are just when a deponent *fails to attend* a deposition. That Rule is involved in this case, and it is undisputed that the Petitioners hereto attended the deposition.

The First Amendment to the Constitution of the United States of America protects vigorous advocacy, and such Amendment is involved in this appeal.

STATEMENT OF THE CASE

Petitioner Ashley and his counsel, Petitioner Maloney, were not involved directly in this litigation. Petitioner Ashley was a non-party witness, who was served with a lengthy subpoena duces tecum and notice to give his deposition in this cause on November 20, 1974, the deposition being scheduled for November 26, 1974 (Tr. 257). Petitioner Ashley was required to bring with him and produce at the deposition a multitude of documents including ". . . all notes and memoranda relating to the allegations in the Petition filed by you in the 57th Judicial District Court, Bexar County, Texas as No. 74-CI-13523, exclusive of notes and memoranda of your attorney as part of his 'work product' (Tr. 28)." Petitioners timely moved to quash the subpoena to testify and produce documents; they requested a protective Order from the District Court; and they made objections to the subpoena, all pursuant to the Federal Rules of Civil Procedure (Tr. 259). Petitioners likewise moved to defer the taking of the deposition of the witness Ashley (Tr. 261). On November 26, 1974, that relief was denied by the Trial Court and the deposition was rescheduled for December

16, 1974 (Tr. 262).

Petitioner Ashley timely perfected his appeal from the Order denying his Motion To Quash Subpoena to Testify and Produce Documents, his Motion for Protective Order, and his Objections To The Subpoena (Tr. 265); and on December 4, 1974, moved the District Court for a stay of such Order pending appeal to the Fifth Circuit (Tr. 266). The Plaintiffs in the case responded to witness Ashley's Motion for stay of order pending appeal contending that even though he is a non-party witness, the Court's Order was not appealable (Tr. 269). The Defendants again moved to defer the taking of the deposition of Petitioner Ashley (Tr. 270). Ashley, relying on *Covey Oil Company v. Continental Oil Company*, 340 F. 2d. 963 (1965), contended that as a non-party witness he had no other relief from the Court's Order but to appeal (Tr. 272). On December 13, the Trial Judge overruled Ashley's motion for stay of order pending appeal (Tr. 275).

The order of the District Judge overruling motion for stay of order pending appeal (Tr. 275) was dated on *Friday*, December 13, 1974. The deposition was scheduled for the *following Monday*, December 16, 1974, at 10:00 o'clock a.m. (Tr. 262). On *Sunday*, the day before the deposition, Jack Pasqual, an associate of Petitioner Maloney, happened to be in the office and discovered the Court's Order Denying Motion For Stay Of Order Pending Appeal. This information was communicated to Petitioner Maloney and it was determined that an immediate appeal from said order, pursuant to Rule 8, Federal Rules of Appellate Procedure, should be promptly presented to the Honorable United States Court of Appeals for the Fifth Circuit. The Motion For Stay Pending Appeal was prepared at 7:30 o'clock a.m. on the day of the deposition, December 16, 1974, and promptly dispatched by United States mail to the Fifth Circuit with an information copy delivered to the United States District Clerk for the Western District of Texas, prior to the

10:00 o'clock a.m. deposition (Tr. 281).

Petitioners *both appeared at the deposition*, and informed counsel that they were filing a motion to stay pending appeal, and respectfully declined to testify, pending a resolution of that appeal (Ex. "A", page 8, 10). The same day, San Antonio Telephone Company, Inc., et al., presented a Motion For Show Cause Order directed to James H. Ashley, which application was unsworn (Tr. 277), and the Trial Judge issued his Show Cause Order to Petitioner Ashley requiring him to be before the Court four days later to show cause why he should not be punished for contempt (Tr. 279). On December 18, 1974, the Trial Court, *sua sponte*, ordered Attorney Maloney to likewise appear on December 20, and show cause why he should not be held in contempt for the same reason (Tr. 280). On December 19, 1974, both Petitioners filed their verified reply to the Court's Order to Show Cause, and in said response, the witness Ashley was tendered fully for deposition (Tr. 281).

On December 30, 1974, the Trial Court conducted its hearing on the show cause, and found both Petitioners guilty of contempt, fined them each Five Hundred ($500.00) Dollars per day, and assessed sanctions in the sum of Two Thousand ($2,000.00) Dollars, (R. 46, 52). As noted by the testimony and brief, there was never an attempt to escape deposition, but only to be given reasonable time for preparation. The Trial Court's obfuscation on this significant point has caused this costly and unnecessary appeal.

ARGUMENT

The honorable Court of Appeals has rendered a decision in this case which conflicts with prior decisions of that Court of Appeals, and decisions of other Courts of Appeals on the same matter and has decided a Federal question and a weighing

conflict with applicable decisions of the Supreme Court of the United States. Petitioners further respectfully submit that the District Court and the United States Court of Appeals have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of United States Supreme Court power of supervision in this case.

The decision of the District Judge, affirmed by the Fifth Circuit, directly conflicts with the rationale, holding and decision of this honorable Supreme Court in *Manness, Petitioner v. Meyers, Presiding Judge*, 95 S. Ct. 584 (1975). No. 73-689. In that case, as in the case at bar, the Record shows no indication whatsoever of contumacious conduct on the part of Petitioner Maloney or Petitioner Ashley. The District Court appears to have been offended, in a strictly legal sense, only by the lawyers' advice which caused his clients to decline to testify on perfectly valid grounds. There is nothing in the Record to suggest that the Petitioners acted other than in good faith, pending disposition of what they believed to be a valid appeal.

Chief Justice Fuller, speaking for the United States Supreme Court in 190 U.S. at 32, 23 S. Ct. at 726, stated:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well-founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow the application of any other general Rule." 190 U.S. at 29, 23 S. Ct. at 725.

Petitioners respectfully submit that they are not subject to the penalty of contempt for their good faith belief and there is no contention at the case at bar that there is any lack of good faith.

Counsel was at all times attempting to represent his client within the bounds of the rules, and within ethical standards of professional conduct. The power to punish an attorney for contempt is one which must be used sparingly, and only when it is clearly demonstrated that the lawyer's conduct is contumacious and tends to bring the administration of justice into disrepute, in contrast to a competent and responsible practitioner, who is acting respectfully to the Court under considerable pressure in the prospect of a lengthy and important trial. *Parmelee Transportation Company v. Keeshin*, 294 F. 2d. 310 (C.A. Ill. 1961) reversed on other grounds, 82 S. Ct. 1288, 370 U.S. 230, 8 L. Ed. 2d. 434; *Collins v. United States*, 269 F. 2d. 745 (C.A.L. cert. den. 80, S. Ct. 662, 362 U.S. 912, 4 L. Ed. 2d. 620).

The Trial Court should have treated Ashley as Chief Justice Reeves of the Western District of Missouri did in *Colorado Mining and Elevator Company v. American Cyanamid Company*, 11 F.R.D. (W.D. Missouri, 1951). In the cited case, Justice Reeves held:

> "No punishment should be inflicted for the refusal to answer. The witness was advised by his counsel not to answer or produce the documents, as counsel sincerely believed that they should not be produced."
>
> "It is the order of the Court, therefore, that the witnesses produce the documents sought."

In this case, your Petitioners upon being apprised by the Fifth Circuit that their Motion to stay pending appeal was denied, did immediately agree to produce the testimony. The *right* of appeal is the aspect the Trial Court ignored.

In *Steamship Company of 1949 v. China Union Lines, et al.*, 123 F. Supp. 802, a motion for contempt to a non-party

witness who refused on the advice of counsel to produce certain documents called for in a subpoena, was denied. That case is analogous to the one at bar. The learned District Judge, in refusing to hold the witness in contempt, stated as follows:

> "I hesitate, under the circumstances here, to impose the drastic relief sought. Mr. Cohan's refusal to produce the documents was by advice of counsel. I have a discretion here which I feel I should exercise. After all, the end to be accomplished is the production of the documents. I, therefore, *hold in abeyance the motion to punish for contempt* and I direct that Mr. Cohan and through him the brokerage corporation to appear before a notary public who is taking the deposition within thirty days from the date of the entry of the order to be entered herein and produce such as the documents specifically set forth and described in the subpoenas as they have in their possession or under their control. *In other words, I direct them to obey the subpoenas.* I fix the date tentatively as April 30, 1954." (Emphasis supplied).

In the case at bar, as in the *Steamship* case, the end to be accomplished is the testimony of the witness. The witness and the documents were proferred for testimony *prior to the hearing on the contempt.*

In 9 *Fed. Pract.* Section 2462, at page 450, the general rule is stated that:

> "The Courts have been very lenient and ordinarily have required production but refused to punish a client who has acted on his attorney's advice."

Petitioner Maloney respectfully submits that his advice to his client was a good faith and competent decision based upon an honest belief that Rule 8, Federal Rules of Appellate

Procedure was appropriate and available. A contrary opinion of the Trial Court does not render it otherwise.

There are numerous cases holding that an attorney has the *right* and duty to advise his client as to the validity of an order of Court which affects his client's interest and that such advice if given in good faith, will not render him liable for contempt because of an error in judgment. *Anderson v. Comptois*, 109 F. 971 (9th Cir.) states as follows:

> "There can be no question as to the right of an attorney to advise his client as to the validity of an order of court or of a writ issued under its authority, where such order or writ affects the client's interest; and if, after investigation, it is the attorney's honest belief that such order or writ is illegal and void, his advice to that effect will not render him liable for an error of judgment". (At page 974).

The *Anderson* case naturally proscribes the attorney from corruptedly conspiring with his client to obstruct the due administration of the law. There is no suggestion, nor could there be, of any contemptuous action on the part of counsel in this case. To the contrary, his advice to his client, as reflected in affidavit of Pat Maloney on file herein, was that the client "respectfully declined to give further testimony with reference to the deposition *because you feel that you are here only to show that you are not contemptuous of the subpoena, but, rather, to inform counsel that you are here in obedience to it, however, you don't purpose to testify further on any other subject because you don't feel that you are validly here considering your appeal is pending, and considering the pending of the Motion to Stay*". (Deposition of James H. Ashley, page 10, emphasis supplied).

In *Leber v. United States*, 170 F. 881 (9th Circuit), the following statement is found:

"The Defendant further justifies his conduct on the ground that he acted in good faith as an attorney in advising Leber that he was under no legal obligations to attend before the notary public notwithstanding the fact that he had been served with a subpoena to do so.

"In the case of *In Re Dubose*, 109 F 971, 974, 48 CCC 14, this Court said:

> 'There can be no question as to the right of an attorney to advise his client as to the validity of an order of court or of a writ issued under its authority, where such an order or writ affects the client's interest; and if after investigation, it is the attorney's honest belief that such order or writ is illegal and void, his advice to that effect will not render him liable for an error of judgment but an attorney cannot go beyond the right to advise and, actuated by a spirit of resistance, conspire with his client or others to disobey an order of the court, obstruct the due administration of the laws, and bring the authority of a Court of Justice into contempt."

Petitioner Maloney respectfully submits that he was at no time actuated by a "spirit of resistance" nor did he "conspire with his client or with others to disobey an order of Court, obstruct the due administration of the laws, and bring the authority of a Court of Justice into contempt." To the contrary, counsel, having been apprised by the Clerk of the United States Court for the Fifth Circuit that motion to stay pending appeal pursuant to Federal Rule 8 had been denied, promptly advised his client to fully testify and client has done so.

In *United States of America v. David R. Schrimsher, In Re Charles D. Butts, Attorney at Law, Appellant*, 493 F. 2d. 842, the Fifth Circuit reversed a conviction of an attorney for contempt, stating:

> "Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the Bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open Court. In light of these possible collateral consequences, Butts' appeal is not 'abstract, feigned or hypothetical' so as to justify dismissal for mootness."

It is conscientiously advanced that just as counsel acted with decorum and respect in the *Butts* case, so did Counsel here.

It is exceedingly important that this Honorable Court consider the time factors presented to counsel in making the "judgment call" presented. As hereinabove noted, it was only happenstance which led to the discovery of the Trial Judge's Order Refusing Delay Pending Appeal. Petitioners respectfully submit that their conduct could not be contemptuous, when *less than twenty-four hours elapsed from the time of receipt of the Court's order denying stay pending appeal until notice was prepared and dispatched to the Fifth Circuit* and, of course, the deposition itself was scheduled at 10:00 o'clock a.m. the following day.

The Trial Court was indeed in serious error in this case in the free exchange of necessary and irreplaceable aspects of advocacy, and his ruling, if allowed to stand, would seriously inhibit the rights of all future clients and counsel to follow. The modest balance that now exists with reference to bench and bar must not be eroded by this serious misuse of judicial power.

PRAYER

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, and to all parties hereto, granting all relief to which these Petitioners may be entitled, at law or in equity.

Respectfully submitted,

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual

2001 Frost Bank Tower
San Antonio, Texas 78205

By Pat Maloney per m.a.s.
Pat Maloney

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of September, 1976, a copy of Petition for Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit, New Orleans, Louisiana, was served upon Mr. Hubert Green, 900 Alamo National Building, San Antonio, Texas; and Mr. Joel Westbrook, 1910 National Bank of Commerce Building, San Antonio, Texas 78205, by deposit in the United States Mail, Return Receipt Requested with adequate postage thereon.

Pat Maloney per m.g.s.
Pat Maloney

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: June 8, 1976

No. 74-4163

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants,

JAMES H. ASHLEY, ET AL.,
Appellants.

Appeals from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(JUNE 8, 1976)

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of JAMES H. ASHLEY, ET AL. in the above entitled and numbered cause be and the same is hereby DENIED.

Form 703-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-4163

D.C. Docket No. CA - SA72-330

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants,

JAMES H. ASHLEY, ET AL.,
Appellants.

Appeals from the United States District Court for the
Western District of Texas

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 2, 1976

Issued as Mandate:

SAN ANTONIO TELEPHONE COMPANY, INC., et al.,
Plaintiffs-Appellees,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY et al., Defendants,

James H. Ashley, et al., Appellants.

No. 74-4163.

United States Court of Appeals,
Fifth Circuit.

April 2, 1976.

The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found a witness and his attorney in contempt for failing to comply with a subpoena duces tecum. Contemnors appealed. The Court of Appeals held that the contemnors' expectation of obtaining a stay of the order either from the trial court or from the Court of Appeals did not excuse their failure to comply.

Affirmed.

1. Federal Civil Procedure ⇐1636

Witness' and his attorney's expectation of obtaining stay of order to appear and produce records either from trial court or from Court of Appeals did not excuse failure to comply.

2. Contempt ⇐74

After holding party in civil contempt for failure to comply with court order, trial court had discretion to order payment by contemnor of out-of-pocket expenses of other party occasioned by failure to comply with court's order and proceeding to bring about end to failure or refusal.

Appeals from the United States District Court for the Western District of Texas.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM:

[1] This appeal deals only with a judgment of civil contempt against a recalcitrant witness in discovery proceedings and his counsel who advised him not to comply with the trial court's order to appear and produce records. The order appealed from recited the fact that the witness and counsel had failed and refused to appear and testify and produce documents in accordance with the command of a subpoena duces tecum. It is undisputed that this finding is correct. The contemnors excuse their conduct only by showing that they expected to obtain a stay of the order either from the trial court or from this Court pending appeal. This will not do. In *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975), the Supreme Court said:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal.

Id. at 458, 95 S.Ct. at 591, 42 L.Ed.2d at 583.

[2] Here the court imposed a penalty of $500 per day for each day that the contemnors should continue in contempt, then determined that they were in compliance and suspended the imposition of the fine "so long as the aforesaid tender of testimony and documents continues;"

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the court then ordered that "so long as the aforesaid tender of testimony and documents continues, the Respondents . . . are deemed purged of the contempt heretofore found and adjudged." The court then determined upon receipt of testimony that counsel for plaintiffs "have incurred in connection with these contempt proceedings cost, expenses, and fees in the reasonable amount of not less than Two Thousand and no/100 ($2,000.00) Dollars." Thereupon the court ordered that the witness and his counsel pay to counsel for plaintiffs the sum of $2000.00 "as sanctions, and not penalty, and as compensation for their cost, expenses, and fees in this behalf expended."

This is a classical case of civil contempt in which the trial court places a recalcitrant party under penalty until he complies with a court order and then orders payment by the contemnor of the out of pocket expenses of the other party occasioned by the failure to comply with the court's order and the proceeding to bring about an end to the failure or refusal. *Dow Chemical Co. v. Chemical Cleaning Inc.*, 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1621, 29 L.Ed.2d 113 (1971).

The judgment is affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-292

JAMES H. ASHLEY AND PAT MALONEY,
Petitioners,

versus

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO AN APPLICATION FOR A WRIT OF CERTIORARI

JOEL W. WESTBROOK
Attorney for Respondents

Of Counsel:
TRUEHEART, MCMILLAN, WESTBROOK
& HOFFMAN
1910 National Bank of
Commerce Building
San Antonio, Texas 78205

Speedy Printing Service, Inc., San Antonio

SUBJECT INDEX

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BRIEF IN OPPOSITION TO AN APPLICATION FOR A WRIT OF CERTIORARI

JOEL W. WESTBROOK
Attorney for Respondents

Of Counsel:
TRUEHEART, MCMILLAN, WESTBROOK
& HOFFMAN
1910 National Bank of
Commerce Building
San Antonio, Texas 78205

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents, SAN ANTONIO TELEPHONE COMPANY, INC., respectfully pray that this Court deny Petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, rendered in this cause on June 8, 1976.

PRELIMINARY STATEMENT

Pursuant to an agreed division of functions between this Respondent and the United States Department of Justice, Appellate Division, this brief is primarily directed to the contempt status of Petitioner James H. Ashley to whose conduct our motion for show cause order was directed (Tr. 277). The brief to be filed by the Justice Department will direct itself to the conduct of Mr. Ashley's attorney, Pat Maloney, whose contempt adjudication stemmed from an order made by the trial court *sua sponte* (Tr. 280).

QUESTION PRESENTED

The United States Court of Appeals, Fifth Circuit, affirmed an order of the United States District Court for the Western District of Texas, San Antonio Division, holding Petitioners, a non-party witness and his attorney, in contempt of Court for the witness' conscious and deliberate refusal, on his attorney's advice, to obey a subpoena duces tecum of that Court, requiring him to testify and produce certain documents at the

taking of the witness' deposition in Respondent's pending civil anti-trust action.

Prior to the scheduled time of the deposition, the Trial Court had denied the Petitioner Ashley's Motion for Stay of Order Pending Appeal (Tr. 275). At the time set for the deposition, the Petitioners had not yet filed a motion to stay the order of the District Court with the United States Court of Appeals for the Fifth Circuit. Nevertheless, although Petitioner-Attorney Maloney produced his client, Ashley, at the deposition, Ashley abstained, on advice of counsel, from testifying, and did not bring with him, much less produce, certain documents which had been subpoened. The only question therefore presented is:

* * * *

> Whether it is contemptuous conduct for a witness to refuse to testify and produce documents at a deposition, pursuant to a subpoena to testify and produce documents, in the face of an order from a United States District Court overruling a Motion to Quash said subpoena duces tecum, and in the absence of a stay of such order.

Petitioners state that, "Should the Trial Court's Order be permitted to stand, it sets a precedent for the tenant [sic] that if one resorts to his right of appeal he stands in jeopardy of contempt for resorting to such constitutional right." Such an interpretation is an unreasonable simplification of the facts of this case. Quite to the contrary, a decision supporting Petitioner's argument would be authority for the proposition that if an attorney possesses a good faith belief that he is "right on the law", he may instruct his client to disobey the orders of a United States District Court and the client will not stand in jeopardy of contempt.

The Order of Contempt issued by the Trial Court does stand for the proposition that once the Court has ruled, counsel and others involved in the action must abide by the ruling and comply with the Court's orders, and, once a ruling is made, counsel should not advise a client not to comply with the order.[1]

STATUTORY PROVISIONS INVOLVED

18 U.S. C. 401 (3)

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 45 (f), *Federal Rules of Civil Procedure*

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 25 (a), *Federal Rules of Appellate Procedure*

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized.

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[1]The Order of Contempt was not included in the Appendix prepared by Petitioners for their presentation before the Fifth Circuit. It was introduced by Respondent's counsel during oral argument, pursuant to a request from the bench. It is reproduced herein on page "A-1".

If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

COUNTER-STATEMENT OF THE CASE

Some of the statements and conclusions contained in Petitioners' "Statement of the Case" are either incorrect or subject to material factual dispute. Respondents feel that some clarification is in order.

Petitioner James H. Ashley was noticed on November 20, 1974 to give his deposition in Respondents' civil anti-trust suit on November 26, 1974. A subpoena to testify and produce documents accompanied said notice (Tr. 258). The following day, November 21, 1974, Petitioner filed a Motion to Quash, a Motion for Protective Order and an Objection to Subpoena, in which the Petitioner requested an Order that the scheduled deposition not be had and that the Court grant Ashley at least one year before appearing as a witness (Tr. 259).

On November 25, 1974, the Defendants in the anti-trust suit [who were also Defendants in a state court suit filed by Petitioners, Tr. 263] filed a Motion to Defer Taking of the Deposition (Tr. 261). On the same day, the Court issued an Order denying Petitioners' motions, but ordered the taking of the deposition be postponed from November 26th until December 16, 1974 (Tr. 262).

Ten days later, on December 4, 1974, Petitioner Ashley filed a Notice of Appeal from the District Court's Order denying his Motion to Quash, Motion for Protective Order and Objection to Subpoena (Tr. 265).

On the same date, Petitioner Ashley moved the District Court for a stay of its prior order pending appeal (Tr. 266). On December 13, 1974, the District Court denied Petitioner Ashley's Motion for Stay Pending Appeal (Tr. 275).

On December 16, 1974, Petitioner Ashley appeared with his attorney at the deposition in response to the Subpoena to Testify and Produce Documents (Tr. 258), and the Court's Order postponing the date of the deposition from November 26, 1974 to December 16, 1974.[2]

At the time set for the deposition, Respondent's Attorney, Joel W. Westbrook, made inquiry of Petitioner-Attorney Maloney as to whether or not a Motion for Stay of Order of the District Court Pending Appeal had been filed with the Fifth Circuit. Mr. Maloney stated that Mr. Jack Pasqual [an attorney associated with Mr. Maloney] was "in the process" of filing such a motion that morning, and, when asked if Mr. Pasqual was in New Orleans, Mr. Maloney replied, "He is headed that way". However, in truth and in fact Petitioner had merely *placed the motion in the mail* that morning. (Ex. "1", page 3, lines 12-20). Petitioners then declined to testify or produce documents, in Maloney's words, "considering the pending of the Motion to Stay." (Ex. "1", page 10, lines 14- 15.)[3]

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[2](The transcript of the proceedings that were had before the Court Reporter was prepared and subsequently introduced into evidence as Plaintiff's Exhibit "1" at the hearing on the Motion to Show Cause [Tr. 289,, page 15, lines 13-14].

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[3]An additional pertinent document not included in the appendix Petitioners prepared for the Fifth Circuit is their "Motion for Stay of Order of District Court Pending Appeal", showing a file stamp of December 18, 1974. That document is reproduced herein on page A-4.

Later that day, December 16, 1974, the Respondents presented a Motion for Show Cause Order directed to James H. Ashley (Tr. 277), and the Trial Court subsequently issued an order requiring Ashley to be before the Court on December 20, 1974 to show cause why he should not be held in contempt (Tr. 279). On December 18, 1974, the District Court, *sua sponte*, ordered Petitioner-Attorney Maloney likewise to appear and show cause as to why he should not be held in contempt (Tr. 280). On December 19, 1974, both Petitioners filed verified replies to the Court's Order to Show Cause, and in said replies tendered Petitioner Ashley for deposition and advised that Petitioner-Attorney Maloney had instructed him to fully and fairly testify and produce the matters subpoenaed (Tr. 281).

On December 20, 1974, the Trial Court conducted its hearing on the Show Cause Order (Tr. 289), and found both Petitioners guilty of civil contempt, fined each of them $500.00 per day until they purged themselves by compliance, and assessed sanctions in the total sum of $2,000.00 as compensation to Respondent's attorneys. Petitioners' state of contempt, was at most, fleeting, as is evidenced by the following excerpts from the transcript of the hearing.

* * * *

The Court:

Then I'll say this, Mr. Maloney, if you are going to submit your client for deposition and you are going to submit these documents instanter, and the deposition is taken, the documents are deposited in the registry of the Court, then you have purged yourself of contempt and your record is clean. (Page 56, lines 19-24).

The Court:

There will be no penalties imposed except the sanctions that the Court has set if you comply with the orders of this Court and the rules and get this deposition taken. (Page 56, lines 7-10).

* * * *

And:

The Court:

And as long as Mr. Westbrook doesn't think that Mr. Ashley or Mr. Maloney are in contempt and they are purging themselves, I'm satisfied. (Page 64, lines 23-25).

It is abundantly clear from the transcript of the show cause hearing (Tr. 289), that Petitioner's sole legal justification for disobeying the subpoena duces tecum and the various orders of the Trial Court was that,

* * * *

Mr. Maloney:

Because in all good faith I really thought that the stay would be granted. I am really still amaged (sic) quite candidly that it was not. (Page 31, lines 1-3).

* * * *

In fact, Petitioners continue to assert this "justification" in their Petition for Writ of Certiorari: "There is nothing in the Record to suggest that the Petitioners acted other than in good faith, pending disposition of what *they believed* to be a valid appeal." Petition for Writ of Certiorari, (page 7; emphasis supplied).

ARGUMENT

It is undisputed that Petitioner, James H. Ashley did, on December 16, 1974, consciously and willfully refuse to obey the clear and specific command of a subpoena duces tecum issued by the Clerk, United States District Court, for the Western District of Texas, to testify on behalf of Plaintiffs-Respondents, San Antonio Telephone Company, Inc., et al., at the taking of a deposition, and to produce certain documents described in the subpoena issued by the Court.

There can be no question that Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani vs. United States*, 384 U.S. 364, 86 Sup. Ct. 1531, 16 L. Ed. 2d 622 (1966). The hallmark of civil contempt is that the sanction imposed is contingent and coercive. After the Trial Court found him in contempt, Petitioner Ashley was immediately extended the opportunity to purge himself of the contempt and thereby avoid the fine. Moreover, Petitioner Ashley's status as a non-party witnes did not alter or affect the nature of the contempt, but was significant only in the procedural sense that the contempt order was in his case immediately appealable. *International Business Machines vs. United States*, 493 F. 2d 112 (2d Cir. 1973), at page 115, Footnote 1.

Notwithstanding the inherent authority of Courts to enforce lawful orders through the medium of civil contempt, the specific conduct of Petitioner Ashley fell squarely within the more specific contempt provisions *of 18 U.S.C. 401 (3)* and *Rule 45(f), Federal Rules of Civil Procedure*. The Court expressly found Petitioner Ashley and his attorney guilty of contempt of the Federal Rules of Civil Procedure and the subpoena duces

tecum issued thereunder. The precise orders of the Court were embodied in the subpoena duces tecum issued by the Clerk pursuant to Respondents' original notice to take Petitioner Ashley's deposition (Tr. 258), as modified by the Court's order of November 25, 1974, which denied Petitioner's motion to quash and postponed the deposition until Monday, December 16, 1974 at 10:00 o'clock a.m. (Tr. 262).

It is settled that neither reliance upon the advice of counsel nor a witnesses' own belief that a subpoena is in any respect invalid excuses disobedience. *Taylor vs. United States*, 221 F. 2d 809 (6th Cir. 1955). cert. denied 350 U.S. 834, 76 Sup. Ct. 69, 100 L. Ed. 744 (1955). Such reliance or belief is properly a matter in mitigation of penalty in true criminal contempt, but it is not a defense in a civil contempt. *United States vs. International Business Machines*, 60 F.R.D. 658, 666 (S.D.N.Y. 1973).

In the recent case of *Maness v. Meyers*, 95 S.Ct. 584, decided January 15, 1975, Chief Justice Burger wrote:

> "We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, *but absent a stay, to comply promptly with the order pending appeal.*" (Emphasis supplied.)

Petitioner filed his Notice of Appeal from the order denying his motion to quash and for protective order on December 4, 1974 (Tr. 265). On that same day, he moved for a stay of the order pending appeal (Tr. 266). The District Court denied the motion for stay on December 13, 1974 (Tr. 275). Petitioner's application to

the Fifth Circuit for a stay was not filed with the Court of Appeals until December 18, 1974, two days after his civil contempt was a *fait accompli* (A-4). The act of mailing the application prior to the beginning of the deposition did not constitute timely filing. *Rule 25(a) Federal Rules of Appellate Procedure.* Even if the application had been filed prior to December 16, 1974, the mere filing would not have relieved Petitioner of the duty of complying with the subpoena. Petitioner would have had to go forward and actually obtain an order granting his application for stay prior to disregarding the Court's order. *Pioche Mines Consolidated, Inc. vs. Dolman*, 333 F. 2d 257 (9th Cir. 1964), cert. denied 380 U.S. 956, 85 Sup. Ct. 1081, 13 L. Ed. 2d (1972).

Petitioner's manifest assumption, with respect to both the motion for stay filed with the Trial Court and the application addressed to the Court of Appeals, was that the mailing of the motion or application, without more, relieved him of the burden of complying with the order complained of until such time as the Court acted. How else can we explain Petitioner's apparent failure to press the Trial Court for a favorable decision on the motion for stay? There is no evidence in this record to suggest that Petitioners ever contacted the Court at any time during the ten day period between the filing of the motion (December 3, 1974), and the entering of the order denying the requested relief (December 13, 1974), to ascertain the disposition of the Court. In a very real sense, the phenomenon which has been characterized by Petitioner's counsel as "the proximity of time," resulted from Petitioner's own failure to take timely action to secure a ruling from the Trial Court. To consider this factor as justification for his

admitted disobedience of the Court's order would be to permit Petitioner Ashley to profit from his own neglect.

There was apparently no attempt made by Petitioner Ashley on the morning of December 16, 1974, to secure an order from the Trial Court delaying the taking of the deposition for the short period of time necessary to obtain a ruling from the Court of Appeals (Tr. 289, page 34, lines 23-25), nor did he attempt to secure an agreed delay from Respondents' counsel. In the light of all these circumstances, it is difficult to understand the rationale for Petitioner's assertions in his petition that the Trial Court's ruling in effect punished him for exercising his right of appeal. (Petition for Writ of Certiorari, page 3).

A slightly different variation of Petitioner's "proximity of time" argument is his assertion at various stages of these proceedings, both before and during the show cause hearing, that more time was needed in order to prepare for the deposition. The trial court granted a delay of almost one month in its order of November 26, 1974 (Tr. 262). Notwithstanding this delay, and even though Petitioner Ashley evidently did have time to make statements to the press and to grant extended interviews (Tr. 289, page 10, lines 4-6) concerning his knowledge of the activities of the Bell System, as such knowledge related to Petitioner's pending state court litigation, he persisted in his contention that he was not afforded enough time. It is not surprising that the Trial Court was less than pleased with this state of events. This was clearly not a situation where "the cat was not yet out of the bag," *Maness v. Meyers*, 95 S.Ct. at p. 593.

Another circumstance urged by Petitioner as having

rendered his disobedience non-contemptuous is that he entertained no ill will, bad faith, or other improper motive toward the Court, but merely exercised poor judgment in refusing to obey its command. In essence, he was respectfully disobedient. The law does not deem this circumstance as a proper consideration. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1948). If the act done is clearly in violation of the Court's order, the intention is of no consequence. Civil contempt is a sanction to enforce compliance with an order of the Court and it is not dependent on the state of mind of Petitioner. *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 433 F. 2d 1058 (8th Cir. 1970), cert. denied 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed. 2d 829.

One final point, perhaps the most significant in the disposition of this application, is that Petitioner exited the status of civil contempt almost as quickly as he entered it, all during the course of the show cause hearing on December 20, 1974. He loses sight of the fact that he purged himself of the contempt on December 20, 1974, when he did produce the documents called for and when he did reach an agreement with Respondent's counsel as to the taking of his deposition (Tr. 289, page 64-67). The Court's contempt adjudication was expressly contingent upon compliance (Tr. 289, page 52, lines 7-22). Under these facts, Petitioner is virtually seeking the same relief from the Supreme Court that he already secured from the trial court upon compliance. With the possible exception of the compensatory award of Respondents' attorney fees, Petitioner's compliance with the order rendered this appeal moot. *Federal Trade Commission v. Stroiman*, 428 F. 2d 808 (8th Cir. 1970).

As to Ashley, a non-party witness, there is no pending controversy other than the reasonableness or necessity of the $2,000.00 compensatory award, and he has thus far refrained from challenging these matters in the Trial Court, in the Court of Appeals, and in his Petition.

CONCLUSION

The key to the disposition of this application is found in Petitioners' Petition for a Writ of Certiorari, in the "Questions Presented" section:

* * * *

> "The Petitioners did appear at the deposition pursuant to subpoena, but abstained from testifying because the Trial Court's order refusing Ashley a stay pending appeal was *being presented* to the Appellate Court, pursuant to the Federal Rules of Appellate Procedure. (Petition for Writ of Certiorari, page 3; emphasis supplied).

* * * *

Under *Maness vs. Meyers*, id., the question is not "was a motion for stay 'being presented'?", but rather, "had a stay been granted?", (at the time of the disobedience of the court's order). Here, the answer is an unequivocal "no".

Regardless of how the facts are shaded, or from what angle they are viewed, the fact remains that Petitioner Ashley, *absent a stay*, did intentionally fail and refuse to obey the order of the trial court.

Although Respondents have incurred significant additional expense in connection with the appeal to the Fifth Circuit and this application for a writ of certiorari above those which the Trial Court's order sought to compensate, no prayer for further compensation will be made herein. *Nelson v. Steiner*, 279 F. 2d 944 (7th Cir. 1960).

PRAYER

WHEREFORE, Respondents respectfully pray that this Court deny Petitioners' Application for a Writ of Certiorari.

Respectfully submitted,

The Original Signed
By Joel W. Westbrook
JOEL W. WESTBROOK
Attorney for Respondents

Of Counsel:
TRUEHEART, MCMILLAN, WESTBROOK & HOFFMAN
1910 National Bank of Commerce Building
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I hereby certify that on this the 15th day of October, 1976, a copy of this Brief in Opposition to an Application for a Writ of Certiorari, was served upon Mr. Pat Maloney, 2001 Frost Bank Tower, San Antonio, Texas, 78205, by deposit in the United States Mail, Return Receipt Requested with adequate postage thereon.

The Original Signed
By Joel W. Westbrook
Joel W. Westbrook

No. 74-4163

FILED
JAN 10 1975
DAN W. ...
By ... Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL

V.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

SA 72 CA 330

U. S. COURT OF APPEALS
FILED
MAR 19 1975
EDWARD W. WADSWORTH
CLERK

CONTEMPT ORDER

On this the 20th day of December, 1974 came on to be heard orders directing one James H. Ashley and his counsel, Pat Maloney, Esquire, a member of the Bar of this Court, to show cause why they each of them should not be held in contempt of this Court, the order directed to Mr. Ashley being responsive to a motion to show cause theretofore filed by the Plaintiffs herein, and the order directed to Mr. Maloney being by the Court sua sponte; and, after due notice to all the parties herein, and to the Respondents Ashley and Maloney, came all the parties hereto, represented by their respective counsel, and came the Respondent Ashley, represented by his counsel Pat Maloney, Esquire, and came Pat Maloney, Esquire, pro se; and, evidence having been adduced and considered by the Court, together with pleadings herein, Plaintiffs' Motion to Show Cause, and the responses of Respondents to the Court's show orders directed to each of them, and the arguments of counsel being likewise considered, it is the opinion of this Court, and the Court so finds, that the Respondents Ashley and Maloney have been heretofore guilty of conscious and

3-16-76 EPT-HT-GRT

deliberate contempt of this Court through the failure and refusal of the Respondent Ashley, by and with the counsel and advice of Respondent Maloney, to appear and testify, and produce documents, in accordance with the command of a subpoena duces tecum issued out of this Court, commanding the appearance and testimony, and production of documents, of the Respondent Ashley on the 26th day of November, 1974, as postponed by order of this Court to 10:00 a.m. December 16, 1974; therefore,

It is, acordingly, ORDERED, ADJUDGED and DECREED that the Respondents James H. Ashley and Pat Maloney, Esquire are each in contempt of this Court as heretofore found; and it is further ORDERED that the taking of testimony, and the production of documents, as commanded by the aforesaid subpoena duces tecum, shall commence instanter in this Courtroom, subject to agreement of counsel as to place and as to continuance from day to day; and it is further ORDERED that the Respondents James H. Ashley and Pat Maloney, Esquire are each of them fined Five Hundred ($500.00) Dollars for each day, or part thereof, that either of them shall continue in contempt of this Court by failure or refusal to obey the immediately foregoing order respecting the taking of testimony and production of documents, and shall be confined to the custody of the United States Marshal for such period as the said contempt shall continue; and, it appearing that in open Court this 20th day of December, 1974 the testimony and documents commanded by the aforesaid subpoena duces tecum have been tendered by the Respondents Ashley and Maloney, the imposition of the aforesaid Five Hundred ($500.00) Dollars per day fines and confinement in the custody of the United States Marshal is hereby suspended so long as the aforesaid tender of testimony and documents continues; and it

is further ORDERED that, so long as the aforesaid tender of testimony and documents continues, the Respondents Ashley and Maloney are deemed purged of the contempt heretofore found and adjudged; and, it appearing to the Court that Joel W. Westbrook, Esquire and K. Key Hoffman, Jr., Esquire, attorneys for Plaintiffs herein, have incurred in connection with these contempt proceedings cost, expenses, and fees in the reasonable amount of not less than Two Thousand and no/100 ($2,000.00) Dollars, it is hereby ORDERED that the Respondents James H. Ashley and Pat Maloney, Esquire shall pay to Joel W. Westbrook, Esquire and K. Key Hoffman, Jr., Esquire the sum of Two Thousand and no/100 ($2,000.00) Dollars as sanctions, and not penalty, and as compensation for their cost, expenses, and fees in this behalf expended.

SIGNED AND ENTERED this 16th day of January, 1974.

John H. Wood, Jr.
United States District Judge

U. S. COURT OF APPEALS
FILED
DEC 18 1974
EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES H. ASHLEY, Appellant

v.

No. 74-4163

SAN ANTONIO TELEPHONE & TELEGRAPH COMPANY, ET AL, Appellees

MOTION FOR STAY OF ORDER OF DISTRICT COURT PENDING APPEAL

TO THE HONORABLE COURT OF APPEALS:

Comes now JAMES H. ASHLEY, a non-party to the above litigation, and Appellant herein, who has timely perfected his appeal to the United States Circuit Court of an order of the District Court; and pursuant to the provisions of Rule 8, Federal Rules of Civil Procedure, files this his Motion For Stay Of Order Of District Court Pending Appeal, and in support hereof shows the Court as follows:

I.

James H. Ashley, Appellant, a non party to this litigation, has been subpoenaed to testify as a witness for Appellee in this cause, (No. SA 72 CA 68, San Antonio Telephone Company, Inc., et al v. American Telephone & Telegraph Company, et al, in the United States District Court for the Western District of Texas, San Antonio Division).

The record in this proceeding will show that the witness Ashley timely filed his Motion To Quash Subpoena to Testify And Produce Records and Documents, Motion for Protective Order and Objections to Subpoena. The aforesaid motions were overruled without hearing by the Trial Court. Appellant, James H. Ashley timely perfected his appeal from said Order to this Honorable Court, contending that the Order of the Hon. John H. Wood, Jr., denying said motions was arbitrary and that the subpoena duces tecum was oppressive and not in compliance with the Federal Rules of Civil Procedure.

(1500 First Bank Tower)

II.

Pursuant to Rule 8, Federal Rules of Appellate Procedure, the witness James H. Ashley filed his Motion For Stay of Order Pending Appeal, presented same to the Trial Court, which MOtion was Denied on December 13, 1974, the last working day prior to the scheduled Deposition, the Trial Court entered an order denying said Motion For Stay.

No reason was given by the District Judge for his action in denying said Motion For Stay.

III.

The reasons for the relief requested are as follows:

1. The witness Ashley, a few days before being served with the subpoena in question, instituted an action against Southwestern Bell Telephone Company and American Telephone & Telegraph Company (two of the defendants in this cause) for damages. He was joined in said action by the family of T.O. Gravitt, deceased. The said action is pending on the docket of the District Court of Bexar County, Texas, 57th Judicial District, styled: Gravitt & Ashley, et al v. Southwestern Bell Telephone Company, et al, No. 74-CI-13523.

2. The Appellant, Ashley, is not a party to the Federal Court litigation, which has been pending on the docket of the District Court for nearly three years. There have been no oral depositions in said Federal Court litigation.

3. The Plaintiffs in the federal case seek to have this witness bring with him and produce for plaintiffs "all notes and memorandum relating to the allegations in the petition filed in the 57th District Court..." In addition, all of the material sought to be subpoenaed by the Plaintiffs in this case constitute information which is material and pertinent to Ashley's State Court litigation, and not to this cause. American Telephone and Telegraph Company is a party defendant to the State Court case, and issue has not even been joined therein by said defendant.

4. Appellant has represented to the Trial Court, and does now represent to this Honorable Court that counsel for Plaintiff in the Federal District Court case is simply on a fishing expedition, seeking to bolster his own case to the detriment and harm of this Appellant, by seeking to have him make a wholesale delivery of all his evidence, memoranda and material to be used by him in his State Court case. This is unreasonable, oppressive, and subjects the witness to undue burden.

5. The Federal District Court case is not ready for trial. This witness is available and under the jurisdiction of the United States District Court for the Western District of Texas; he is a resident of San Antonio, Bexar County, Texas, he has a State suit pending, and will not flee the jurisdiction of that Court.

6. The magnitude of the allegations in connection with Ashley's State Court case is such that it requires his total concentration and cooperation with counsel, and will require same for at least 180 days, in order that his State Court case can properly proceed to trial. This Witness has the right to plan his trial strategy in his own State Court case, without having delivered all of his confidential evidence to the Plaintiffs in this case.

7. The allegations for which Appellant seeks to have quashed requires this witness to deliver documents consisting of four legal sized pages, and seeks privileged communications and non discoverable matters. The granting of the deposition at this time will irreparably prejudice this Witness Appellant in his state court litigation. On the other hand, to Stay the Order of the District Judge and quash the deposition will in no way deter the Federal Court suit.

The order of the learned trial judge which is appealed herein, is an appealable order. Covey Oil Company et al v. Continental Oil Company, 340 Fed. 2d 963 (1965). The witness Ashley has no relief other than to appeal said order. The witness Ashley could not wait until the final judgment in the case and then appeal, as he was not and is not a party to the litigation.

The witness Ashley will be irreparably harmed and damaged unless the honorable Appelate Court stays said order pending determination of his appeal.

IV.

The following parts of the record are filed with this motion and attached hereto and made a part hereof for all purposes:

1. Subpoena to Testify and Produce Documents with Attachments;
2. Motion to Quash Subpoena to Testify and Produce Documents; Motion for Protective Order and Objection to Subpoena;
3. Defendants' Motion to Defer Taking of Deposition of the Witness, James H. Ashley;
4. Order, entered the 25th day of November, 1974, denying the aforesaid Motion of the witness Ashley;
5. Plaintiffs' Motion to Amend Order Postponing Deposition of James H. Ashley;
6. Motion to Stay of Order Pending Appeal;
7. Plaintiffs' Response to Witness Ashley's Motion for Stay of Order Pending Appeal;
8. Witness Ashley's Reply to Plaintiffs' Response to Motion for Stay of Order Pending Appeal;
9. Defendants' Second Motion to Defer Taking of the Deposition of James H. Ashley;
10. Order of December 13, 1974, denying Motion for Stay of Order Pending Appeal filed by the witness James H. Ashley;
11. Order of December 13, 1974, denying Defendants' Second Motion to Defer Taking of the Deposition of James H. Ashley;
12. Order of December 13, 1974, denying Plaintiffs' Motion to Amend Order Postponing Deposition of Witness James H. Ashley.

WHEREFORE, PREMISES CONSIDERED, Appellant, James H. Ashley, prays that the Honorable Circuit Court stays the order of the District Court pending appeal.

Respectfully submitted,

LAW OFFICES OF PAT MALONEY

Pat Maloney
Attorney for James H. Ashley

STATE OF TEXAS

COUNTY OF BEXAR

Before me, the undersigned authority, on this day personally appeared James H. Ashley, known to me to be the Appellant, and after being by me first duly sworn upon his oath stated that he has read the allegations in the foregoing and they are true and correct.

James H. Ashley

SWORN TO AND SUBSCRIBED before me by the said James H. Ashley, on this the 16th day of December, 1974.

Notary Public, Bexar County, Texas

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Motion for Stay of Order of District Court Pending Appeal was mailed by United States Certified Mail, Return Receipt Requested, to WILLIAM GWIN, Esquire, Green, Kaufman & Canfear, 900 Alamo National Building, San Antonio, Texas 78205; JOEL W. WESTBROOK, Esquire, 1910 National Bank of Commerce Building, San Antonio, Texas 78205; J. HARRISON SMITH, Esquire, Fox, Smith, Smith, Hale & Guenther, 500 National Bank of Commerce Building, San Antonio, Texas 78205, HAROLD L. SINGER, Esquire, 54th Floor, The First International Building, 1st & Field Street, Dallas, Texas 75202, and DEWEY, BALLANTINE, BUSBY, PALMER & WOOD, 140 Broadway, New York, New York 10005 on this the 16 day of December, 1974.

Pat Maloney

A true copy
Teste: HAROLD W. WAINWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By A B. Johnson
Deputy DEC 18 1974
New Orleans, Louisiana

ORIGINAL

RECEIPT FOR PAYMENT

AO Form No. 103
Form approved by
Comp. Gen. U. S.
January 8, 1953

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

Received From [illegible]

(NAME)

(ADDRESS)

74-4163 [illegible]

CASE NO. (SHORT TITLE)

ACCOUNT	AMOUNT	
Clerk's Fee for docketing case	[illegible]	00
Miscellaneous Fees		
Certified copy of		
Copy of Opinion		
Certificate of admission		
Copy of Court Rules		
TOTAL	[illegible]	[illegible]

Clerk [ ]
Deputy Clerk [✓]
Clerk Asst. [ ]

[illegible] 31201

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By N B Johnson
Deputy

New Orleans, [illegible] DEC 18 1974